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# Golden Affinity Development Sdn Bhd (in liquidation) v Lim Yok Wah & Ors and another case

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-472–08 OF 2019 AND WA-22NCC-210–05 OF 2020
LIZA CHAN J
19 MARCH 2023

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*Companies and Corporations — Fraudulent trading — Allegation of unlawful declaration and distribution of dividend of company — Plaintiff claimed monies allegedly dissipated to defendants — Whether dividend declaration had breached s 132 of Companies Act 2016 ('the CA 2016') — Whether first to seventh defendants had committed fraudulent trading pursuant to ss 540 of CA 2016 or 304 of the Companies Act 1965 — Whether defendants ignored liquidated and ascertained damages claims — Whether properties transacted below market value — Whether defendants conspired to defraud plaintiff in dissipating its assets vis a vis dividend of RM27m — Whether liquidator should pay costs personally*

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Two suits, namely Suit 472 and Suit 210 were heard together. The relief sought by the plaintiff in Suit 472 against the former directors, current directors and shareholders of the first defendant ('the company') was grounded on an allegation of unlawful declaration and distribution of dividends of the plaintiff in the sum of RM27m. The relief sought in Suit 210 by the plaintiff was to claim monies allegedly dissipated to the defendants premised upon a supplemental forensic report and a supplemental liquidator report. It was the purported finding of the reports that RM6,240,000 was paid to the defendants from the plaintiff's cash flow therefore enriching themselves without paying compensation for liquidated and ascertained damages ('LAD') made by purchasers pursuant to late delivery of vacant possession by the plaintiff. The plaintiff was a holding and development company which owned a piece of land ('the land') that had been developed into a development comprising 32 units of three-storey semi-detached industrial factories ('the project'). There were six unsold units ('Property 1 to Property 6'). The project was completed and the plaintiff delivered vacant possession of the sold units in March 2016. The plaintiff declared dividends of RM27m to its shareholders and the dividends declared were distributed partially in cash and in kind with the remaining unsold six properties. The fifth defendant nominated its subsidiary, the sixth defendant, to receive Property 1 to Property 4 by entering into sale and purchase agreements ('SPA') with the plaintiff at the total purchase consideration of RM17.659m which was contra with the dividend payable to the fifth defendant. The third defendant nominated his company, the seventh defendant, to receive Property 5 and Property 6 by entering into SPAs with the

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plaintiff at the total purchase consideration of RM5.628m which was contra with the dividends payable to the third defendant. In 2017, the plaintiff was ordered to be wound up and a liquidator was appointed. Subsequent to the winding up, the liquidator received proof of debts ('POD') from a group of creditors who were purchasers and had bought the said factories. The POD was predicated upon their claims for compensation for the LAD amounting to RM6,443,802.41.

**Held:**

(1) The Companies Act 2016 ('the CA 2016') did not have retrospective effect. Any rights accrued, inter alia, under the Companies Act 1965 ('the CA 1965'), before the enactment of CA 2016 would be preserved by s 620(4) of the CA 2016. Therefore, s 365 of the CA 1965 applied and the dividend declaration was 'paid out of profits' (see para 31).

(2) The evidence as a whole did not support a finding of fraud. There was no police report made. The allegations of fraud remained just that. Neither was a report made by the liquidator with Suruhanjaya Syarikat Malaysia. That there was no fraud was also consistent with the two liquidator's reports and two forensic accountant's reports were deafeningly silent on 'fraud' (see paras 38–40).

(3) The plaintiff's argument that there was no bar to a claim for LAD when purchasers pay up the purchase price late, ignored with impunity the provisions of cl 17.1 of the SPA. The liquidator ought to have rejected the PODs filed by the purchasers who have an outstanding sum due and payable to the plaintiff. The purchasers' POD claims for LAD was admitted by the liquidator for expediency — to bolster a weak and hopeless case for breach of s 132 of the CA 2016 and/or for fraudulent trading. There was no dissipation of assets of the plaintiff simply due to the plaintiff's assertion that the provisional sum of RM1,905,008 allocated for financial year 2015 was removed from the financial statements in 2016 and none of the purchasers were paid. Firstly because the LAD claims in the year 2016 had not crystallised when dividend was declared. At the time dividend was declared, there was also no judgment against the company. Secondly, the provisional sum of RM1,905,008 appeared in the audited report for financial year ended 30 June 2016. Thirdly, the plaintiff's auditor had explained that the provision for LAD of RM1,905,008 was reclassified to make provision for income tax instead. Fourthly, provisional sums may be reclassified or removed (see paras 47 & 52–58).

(4) The liquidator was unsure if the sale of the properties were in fact below market value. The liquidator's valuer also agreed that the valuation and purchase consideration for Properties 1, 3, 4 and 5 were accepted by Jabatan Penilaian dan Perkhidmatan Harta ('JPPH') as the actual market

value. Next, the IRB tax officer attested to the independence of JPPH with regards to the valuation of properties. The four properties thus were not sold at an undervalue. For Property 6, JPPH's valuation was accepted and as such, the seventh defendant was ordered to pay the differential sum of RM46,000 to the plaintiff. As for Property 2, JPPH's valuation was also accepted. The first, second, fifth and sixth defendants were ordered jointly and or severally to pay a sum of RM36,000 to the plaintiff (see paras 60–65).

(5) The conspiracy claim was deficient as the CA 1965 applied and there was no breach of s 132 of the CA 2016. The conspiracy set out did not make clear the pleaded type of conspiracy and its elements and the consequences should be strict and warranted a dismissal of the claim for conspiracy. Added to that, conspiracy was never put to any of the defendants' witnesses (see paras 68–69 & 74–75).

(6) In regard to the claim for unpaid income tax of RM6,480,000 for RM27m dividend distributed, this claim was plainly misconceived as s 108 of the Income Tax Act 1967 was clear — there was no tax deductible from the distribution of the dividend. The declaration and distribution of the dividend made out of profits was lawful in accordance with s 365 of the CA 1965. The plaintiff's other or alternative causes of action had not been proven on a balance of probability. Suit 472 was thus dismissed with costs except for the orders for payment for Property 2 and Property 6 sold at undervalue (see paras 77 & 86).

(7) The payment of RM1,680,000 received by the third defendant was due to the distribution of the interim dividend as Lee Haw Han's entitlement as one of the shareholders of the plaintiff. The third defendant was also not a director of the plaintiff. The plaintiff had not led any contemporaneous evidence and/or provided sufficient particulars to show that the third defendant was in control of the plaintiff and/or the directing mind behind the trading of the plaintiff and/or had any involvement with the business of the plaintiff. Therefore, this claim against the third defendant was unsustainable. The actual complaint against the fourth defendant in respect of this sum of RM 995,000 was to all intent and purposes one of undue preference. Undue preference was however not pleaded and must now be moot. The claim for fraudulent trading did not resonate with the court and the plaintiff had not proven its claim as pleaded on a balance of probability. The issues and the submissions in Suit 210 on fraudulent trading overlapped with and was duplicitous of the allegation of fraudulent trading in Suit 472. In the circumstances, Suit 210 was dismissed with costs (see paras 93–95, 99–100 & 103–104).

(8) Considering that the defendants had succeeded in defending most heads of claim, the defendants should be entitled to costs. There was evidence

that the liquidator had instituted these actions, in the name of the plaintiff, out of bad faith or a misguided sense of propriety of the course of action he had taken. Costs should not be paid out of the assets of the company, as that would impinge on the contributories' rights to a surplus of funds, if any. The evidence and conduct of the liquidator warranted an order for costs to be made personally against him (see paras 110, 114 & 118–119).

**[Bahasa Malaysia summary**

Dua saman iaitu Saman 472 dan Saman 210 didengar bersama. Relif yang dipohon oleh plaintif dalam Saman 472 terhadap bekas pengarah, pengarah semasa dan pemegang saham defendan pertama ('syarikat') adalah berdasarkan dakwaan pengisytiharan dan pengagihan dividen plaintif yang menyalahi undang-undang berjumlah RM27 juta. Relif yang dipohon dalam Saman 210 oleh plaintif adalah untuk menuntut wang yang didakwa dilesapkan kepada defendan berdasarkan laporan forensik tambahan dan laporan pelikuidasi tambahan. Ia adalah penemuan laporan bahawa RM6,240,000 telah dibayar kepada defendan daripada aliran tunai plaintif dengan itu memperkayakan diri mereka sendiri tanpa membayar pampasan bagi ganti rugi tertentu dan ditetapkan ('GTD') yang dibuat oleh pembeli kerana serahan lewat milikan kosong oleh plaintif. Plaintif adalah sebuah syarikat induk dan pembangunan yang memiliki sebidang tanah ('tanah') yang telah dibangunkan menjadi pembangunan yang terdiri daripada 32 unit kilang perindustrian berkembar tiga tingkat ('projek'). Terdapat enam unit yang tidak terjual ('Hartanah 1 hingga Hartanah 6'). Projek tersebut siap dan plaintif menyerahkan milikan kosong unit yang dijual pada Mac 2016. Plaintif mengisytiharkan dividen RM27 juta kepada pemegang sahamnya dan dividen yang diisytiharkan diagihkan sebahagiannya dalam bentuk tunai dan barangan dengan baki enam hartanah yang tidak terjual. Defendan kelima menamakan subsidiarinya, defendan keenam, untuk menerima Hartanah 1 hingga Hartanah 4 dengan memeterai perjanjian jual beli ('PJB') dengan plaintif pada jumlah balasan pembelian RM17.659 juta yang kontra dengan dividen yang perlu dibayar kepada defendan kelima. Defendan ketiga mencalonkan syarikatnya, defendan ketujuh, untuk menerima Hartanah 5 dan Hartanah 6 dengan memeterai PJB bersama plaintif dengan jumlah balasan pembelian RM5.628m yang kontra dengan dividen yang perlu dibayar kepada defendan ketiga. Pada 2017, plaintif telah diperintahkan untuk digulung dan pelikuidasi telah dilantik. Selepas penggulungan, pelikuidasi menerima bukti hutang ('BH') daripada sekumpulan pemiutang yang merupakan pembeli dan telah membeli kilang tersebut. BH adalah berdasarkan tuntutan mereka untuk pampasan untuk GTD berjumlah RM6,443,802.41.

**Diputuskan:**

(1) Akta Syarikat 2016 ('AS 2016') tidak mempunyai kesan retrospektif.

Sebarang hak terakru, antara lain di bawah Akta Syarikat 1965 ('AS 1965'), sebelum enakmen AS 2016 akan dipelihara oleh s 620(4) AS 2016. Oleh itu, s 365 AS 1965 digunakan dan dividen pengisytiharan telah 'dibayar daripada keuntungan' (lihat perenggan 31).

(2) Keterangan secara keseluruhannya tidak menyokong penemuan penipuan. Tiada laporan polis dibuat. Tuduhan penipuan kekal begitu sahaja. Laporan juga tidak dibuat oleh pelikuidasi dengan Suruhanjaya Syarikat Malaysia. Bahawa tiada penipuan juga adalah konsisten dengan dua laporan pelikuidasi dan dua laporan akauntan forensik yang diam mengenai 'penipuan' (lihat perenggan 38–40).

(3) Hujahan plaintif bahawa tiada halangan kepada tuntutan GTD apabila pembeli membayar harga pembelian lewat, mengabaikan dengan sewenangnya-wenangnya peruntukan klausa 17.1 PJB. Pelikuidasi sepatutnya menolak BH yang difailkan oleh pembeli yang mempunyai jumlah tertunggak yang terhutang dan perlu dibayar kepada plaintif. Tuntutan BH pembeli untuk GTD telah diterima oleh pelikuidasi untuk kesesuaian — untuk menyokong kes yang lemah dan tiada harapan untuk pelanggaran s 132 AS 2016 dan/atau untuk penipuan perdagangan. Tiada pelesapan aset plaintif hanya disebabkan oleh penegasan plaintif bahawa jumlah sementara sebanyak RM1,905,008 yang diperuntukkan untuk tahun kewangan 2015 telah dikeluarkan daripada penyata kewangan pada 2016 dan tiada pembeli dibayar. Pertama kerana tuntutan GTD pada tahun 2016 belum terlaksana apabila dividen diisytiharkan. Pada masa dividen diisytiharkan, juga tiada penghakiman terhadap syarikat. Kedua, jumlah sementara sebanyak RM1,905,008 terdapat dalam laporan teraudit bagi tahun kewangan berakhir 30 Jun 2016. Ketiga, juruaudit plaintif telah menjelaskan bahawa peruntukan untuk GTD sebanyak RM1,905,008 telah diklasifikasikan semula untuk membuat peruntukan cukai pendapatan. Keempat, jumlah sementara boleh diklasifikasikan semula atau dikeluarkan (lihat perenggan 47 & 52–58).

(4) Pelikuidasi tidak pasti sama ada penjualan hartanah itu sebenarnya di bawah nilai pasaran. Penilai pelikuidasi juga bersetuju bahawa penilaian dan pertimbangan pembelian untuk Hartanah 1, 3, 4 dan 5 telah diterima oleh Jabatan Penilaian dan Perkhidmatan Harta ('JPPH') sebagai nilai pasaran sebenar. Seterusnya, pegawai cukai LHDN mengesahkan kebebasan JPPH berhubung penilaian hartanah. Oleh itu, keempat-empat hartanah itu tidak dijual pada nilai yang lebih rendah. Bagi Hartanah 6, penilaian JPPH telah diterima dan oleh itu, defendan ketujuh diperintahkan untuk membayar jumlah pembezaan sebanyak RM46,000 kepada plaintif. Bagi Hartanah 2, penilaian JPPH juga diterima. Defendan pertama, kedua, kelima dan keenam telah diperintahkan secara bersama dan atau berasingan membayar sejumlah

RM36,000 kepada plaintif (lihat perenggan 60–65).

(5) Tuntutan konspirasi adalah gagal kerana AS 1965 terpakai dan tiada pelanggaran s 132 AS 2016. Konspirasi yang dinyatakan tidak menjelaskan dengan jelas jenis konspirasi yang didakwa dan unsur-unsurnya dan akibatnya hendaklah tegas dan mewajarkan penolakan tuntutan untuk konspirasi. Selain itu, konspirasi tidak pernah dicadangkan kepada mana-mana saksi defendan (lihat perenggan 68–69 & 74–75).

(6) Berkenaan dengan tuntutan cukai pendapatan yang belum dibayar sebanyak RM6,480,000 untuk dividen RM27 juta yang diagihkan, tuntutan ini jelas salah sangka kerana s 108 Akta Cukai Pendapatan 1967 adalah jelas — tiada cukai boleh ditolak daripada pengagihan dividen. Pengisytiharan dan pengagihan dividen yang dibuat daripada keuntungan adalah sah mengikut s 365 AS 1965. Kausa tindakan lain atau alternatif plaintif tidak dibuktikan pada imbangan kebarangkalian. Oleh itu, Guaman 472 telah ditolak dengan kos kecuali untuk perintah pembayaran bagi Hartanah 2 dan Hartanah 6 yang dijual pada nilai di bawah (lihat perenggan 77 & 86).

(7) Bayaran RM1,680,000 yang diterima oleh defendan ketiga adalah disebabkan oleh pembahagian dividen interim sebagai kelayakan Lee Haw Han sebagai salah seorang pemegang saham plaintif. Defendan ketiga juga bukan pengarah plaintif. Plaintif tidak memberikan sebarang keterangan semasa dan/atau memberikan butir-butir yang mencukupi untuk menunjukkan bahawa defendan ketiga mengawal plaintif dan/atau minda yang mengarahkan di sebalik perdagangan plaintif dan/atau mempunyai sebarang penglibatan dengan perniagaan plaintif. Oleh itu, tuntutan terhadap defendan ketiga ini adalah tidak dapat dipertahankan. Aduan sebenar terhadap defendan keempat berkenaan dengan jumlah RM 995,000 ini adalah untuk semua niat dan tujuan satu kecenderungan yang tidak wajar. Kecenderungan yang tidak wajar bagaimanapun tidak dirayu dan kini mesti dipertikaikan. Tuntutan untuk penipuan perdagangan tidak bersama dengan mahkamah dan plaintif tidak membuktikan tuntutannya seperti dipohon pada imbangan kebarangkalian. Isu dan hujahan dalam Saman 210 mengenai penipuan perdagangan bertindih dengan dan adalah ulangan dakwaan penipuan perdagangan dalam Saman 472. Dalam keadaan tersebut, Saman 210 telah ditolak dengan kos (lihat perenggan 93–95, 99–100 & 103–104).

(8) Memandangkan defendan telah berjaya mempertahankan kebanyakan bahagian tuntutan, defendan sepatutnya berhak mendapat kos. Terdapat keterangan bahawa pelikuidasi telah memulakan tindakan ini, atas nama plaintif, atas niat jahat atau rasa salah arah kewajaran tindakan yang telah diambilnya. Kos tidak seharusnya dibayar daripada aset syarikat, kerana

ia akan menjejaskan hak pencarum terhadap lebihan dana, jika ada. Keterangan dan kelakuan pelikuidasi mewajarkan perintah supaya kos dibuat secara peribadi terhadapnya (lihat perenggan 110, 114 & 118–119).]

**Cases referred to**

*Acoustic & Lighting System Sdn Bhd v Golden Affinity Development Sdn Bhd* [2017] MLJU 2283, HC (folld)

*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, CA (folld)

*Al Sharhan Sdn Bhd & Anor v Edipro Construction & Engineering* [2021] 10 MLJ 585, HC (folld)

*Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor* [2016] 5 MLJ 242; [2016] 8 CLJ 597, CA (refd)

*Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290; BC200501342, FC (refd)

*Browne v Dunn* (1893) 6 R 67, HL (folld)

*Burns v TAFE Commission of New South Wales* BC9403520, SC (refd)

*City of London Group plc v Lothbury Financial Services Ltd* [2012] EWHC 3148, Ch D (refd)

*Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693, FC (refd)

*Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61, FC (refd)

*Elite Mega Builders Sdn Bhd v Puncak Sepakat Sdn Bhd (Zamrud Intan Snd Bhd, applicant)* [2015] MLJU 1931; [2015] 1 LNS 414, HC (refd)

*Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1, FC (refd)

*GS Paper & Packing Sdn Bhd v BSA Manufacturing Sdn Bhd* [2013] 1 LNS 421, HC (refd)

*Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors* [1996] 3 MLJ 259, HC (refd)

*Goldiant Development Sdn Bhd v Fan Boon Heng* [2018] MLJU 324; [2018] 1 LNS 338, HC (distd)

*Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292, FC (refd)

*Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697, FC (refd)

*Joseph Lee Yok Min @ Ambrose v Mayban Securities Sdn Bhd, Ipoh Branch (formerly known as Philleoallied Securities Sdn Bhd) & Anor* [2014] 2 MLJ 848; [2014] 3 CLJ 285, CA (refd)

*Kam Thai Eng Linda & Anor v Tan Sri Dato' Kam Woon Wah & Ors* [2023] 1 MLJ 765, CA (distd)

*Karaha Bodas Co Llc v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR 112, CA (refd)
*Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2000] 7 MLJ 74; [2000] 1 LNS 355, HC (refd)
*Koperasi Kastam Diraja Malaysia Bhd v Yi Go Group Sdn Bhd* [2021] 5 MLJ 590; [2021] 10 CLJ 31, CA (distd)
*Lim Guan Eng v PP* [1998] 3 MLJ 14; [1998] 3 CLJ 769, CA (refd)
*Mak Siew Wei v Yeoh Eng Kong and other appeals* [2020] 1 MLJ 258, CA (refd)
*Markcon Sdn Bhd (in liquidation) v Resilient Construction Sdn Bhd (Labtec Sdn Bhd & Anor; Opposing Creditors)* [1993] 3 MLJ 429, HC (folld)
*McKellar v Container Terminal Management Services Ltd* [1999] 165 ALR 409, FC (refd)
*Mohd Isha bin Awang v Mohamad Idris bin Seramal Baris* [2020] 6 MLJ 116; [2020] 9 CLJ 760, CA (distd)
*Muthiah a/l Ramasamy v Muguthan a/l Vadiveloo (sole practitioner in the name and style of Messrs Mugu & Sufyan & Co)* [2022] MLJU 1028; [2022] 7 CLJ 940, HC (distd)
*Ng Ah Ba & Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62, CA (refd)
*Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713, FC (refd)
*PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 (refd)
*Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394, CA (refd)
*Repco (M) Sdn Bhd v Tan Toh Fatt & Ors* [2013] 7 MLJ 408, HC (refd)
*Sainimuda bin PM Salleh & Anor v Mohd Amin Pare & Ors* [2018] MLJU 2065; [2018] 1 LNS 2188, HC (distd)
*Satchithanantham v Zeaiter Corporate Holdings Pty Ltd* [2011] NSWSC 1609, SC (refd)
*Shiva Kumar Day v Allianz Life Insurance Malaysia Bhd & Anor* [2021] MLJU 823, HC (folld)
*Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101, CA (refd)
*Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395, CA (folld)
*Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421, CA (refd)
*Wilson Lovatt & Sons Ltd, Re* [1977] 1 All ER 274, Ch D (folld)
*Zamzam Arabic Food Holding Sdn Bhd & Anor v Johanjana Corp Sdn Bhd* [2022] 5 MLJ 302, CA (refd)

**Legislation referred to**

Companies Act 1965 (repealed by Companies Act 2016) ss 58, 169, 279, 295, 304, 365, 365(1)
Companies Act 2016 ss 132, 132(2), (3), 228, 484, 517, 530, 536, 540, 540(5), 620(4)
Companies Regulations 1966 Form 58

Companies (Winding-Up) Rules 1972 r 93
Evidence Act 1950 s 73A(1)
Income Tax Act 1967 s 108
Rules of Court 2012 O 40A r 3, O 59 r 16, O 92 r 1(1)

*KF Ee (with Emily Hiew) (KF Ee & Co) in Suit Nos WA-22NCC-472–08 of 2019 and WA-22NCC-210–05 of 2020 for the plaintiff.*
*Wong Rhen Yen (with Goik Kenwayne and Foong Kar Yee) (Dennis Nik & Wong) in Suit No WA-22NCC-472–08 of 2019 for the first, second, fifth and sixth defendants.*
*Peter-Douglas Ling (with Crystal Yeoh) (Peter Ling & Co) in Suit No WA-22NCC-472–08 of 2019 for the third and seventh defendants.*
*Ahmad Ezmeel (Ezmeel & Co) in Suit No WA-22NCC-472–08 of 2019 for the fourth defendant.*
*Kelly Yap in Suit Nos WA-22NCC-472–08 of 2019 and WA-22NCC-210–05 of 2020 watching brief for Searay Engineering Sdn Bhd.*
*S Raven (with Siti Nur Amirah and Russel Wilson) (S Ravenesan) in Suit No WA-22NCC-210–05 of 2020 for the third defendant.*
*Peter-Douglas Ling (with Crystal Yeoh) (Peter Ling & Co) in Suit No WA-22NCC-210–05 of 2020 for the fourth defendant.*

**Liza Chan J:**

INTRODUCTION

**[1]** The two suits before this court, namely KL HC WA-22NCC-472–08 of 2019 ('Suit 472') and KLHC WA-22NCC-210–05 of 2020 ('Suit 210') were consolidated to be heard together.

**[2]** The relief sought by the plaintiff in Suit 472 against the former directors, current directors and shareholders of the first defendant ('interchangeably the company') is grounded on an allegation of unlawful declaration and distribution of dividend of the plaintiff in the sum of RM27m.

**[3]** The relief sought in Suit 210 by the plaintiff is to claim monies allegedly dissipated to the defendants premised upon a supplemental forensic report which was completed on 6 May 2020 ('supplemental forensic report') and a supplemental liquidator report dated 21 May 2020. It is the purported finding of the said reports that RM6,240,000 was paid to the to the defendants from the plaintiff's cash flow therefore enriching themselves without paying compensation for liquidated and ascertained damages ('LAD') made by purchasers pursuant to late delivery of vacant possession by the plaintiff.

**[4]** After a full trial lasting 16 days conducted virtually online by using the Zoom video conferencing platform, where the plaintiff called six witnesses

whilst the defendants called five witnesses, I had on 9 January 2023 allowed the plaintiff's claim in part only for Suit 472 and dismissed Suit 210. This judgment contains the reasons for my decision.

BACKGROUND

**[5]** The background facts and events are culled from the parties' agreed facts and cause papers.

**[6]** The plaintiff was a holding and development company. It owned a piece of land in Puchong, Negeri Selangor Darul Ehsan ('the said land') which it developed into a development known as 'i-32 Corporate Industrial Park' comprising of 32 units of three-storey semi-detached industrial factories ('the project').

**[7]** There were six unsold units as follows:

(a) HS(D)296626, No PT 5918, Pekan Puchong Perdana, Daerah Petaling, Negeri Selangor Darul Ehsan ('Property 1');

(b) HS(D)296627, No PT 5919, Pekan Puchong Perdana, Daerah Petaling, Negeri Selangor Darul Ehsan ('Property 2');

(c) HS(D)296629, No PT 5921, Pekan Puchong Perdana, Daerah Petaling, Negeri Selangor Darul Ehsan ('Property 3');

(d) HS(D)296630, No PT 5922, Pekan Puchong Perdana, Daerah Petaling, Negeri Selangor Darul Ehsan ('Property 4');

(e) HS(D)296644, No PT 5936, Pekan Puchong Perdana, Daerah Petaling, Negeri Selangor Darul Ehsan ('Property 5'); and

(f) HS(D)296645, No PT 5937, Pekan Puchong Perdana, Daerah Petaling, Negeri Selangor Darul Ehsan ('Property 6').

**[8]** Property 2 and Property 6 are small pieces of empty land of 75.99 sqmt (818 sqft) and 94 sqmt (1,012 sqft) respectively in size. They are not factory lots.

**[9]** As for the defendants ('D'):

| Defendants | Particulars | Date of Appointment | Date of Resignation |
|---|---|---|---|
| D1 | Former director of plaintiff, a shareholder of D5 with 45% shareholding | 7 July 2011 | 16 January 2017 |

| | | | |
|---|---|---|---|
| D2 | Former director of plaintiff shareholders of D5 with 20% shareholding | 7 July 2011 | 14 July 2017 |
| D3 | Former director of plaintiff; shareholder of plaintiff with 20% shareholding; director and shareholder of D7 | 7 July 2011 | 14 July 2017 |
| D4 | Former director of plaintiff; shareholder of plaintiff with 12% shareholding | 7 July 2011 | 16 January 2017 |
| D5 | Shareholder of the plaintiff with 68% shareholding | | |
| D6 | Wholly owned subsidiary of D5 | | |
| D7 | Private limited company incorporated in Malaysia,connected to D3 | | |
| D8 | Current director of plaintiff | 13 July 2017 | N/A |
| D9 | Current director of plaintiff | 13 July 2017 | N/A |

**[10]** The project was completed and the plaintiff delivered vacant possession of the sold units in March 2016.

**[11]** On 7 December 2016, the plaintiff declared dividends of RM27m to its shareholders. The particulars of the dividend payable are:

| Shareholders | Number of Shares | Dividend Payable (RM) |
|---|---|---|
| D5 | 680,000 | 18,360,000 |
| D3 | 200,000 | 5,400,000 |
| D4 | 120,000 | 3,240,000 |
| Total | 1,000,000 | 27,000,000 |

**[12]** The dividend declared was distributed partially in cash and in kind with the remaining unsold six properties as follows:

| Shareholders | Dividend Payable (RM) | Cash paid | Paid in kind |
|---|---|---|---|
| D5 | 18,360,000 | RM700,400 | Four units ('Property 1 to Property 4') at consideration of RM17,659,600 |

| | | | |
|---|---|---|---|
| D3 | 5,400,000 | RM200,000 | Two units ('Property 5 and Property 6') at consideration of RM5,200,000 |
| D4 | 3,240,000 | RM3,200,000 | |
| Total | 27,000,000 | | |

**[13]** D5 nominated its subsidiary, D6 to receive Property 1 to Property 4 by entering into sale and purchase agreements ('SPA') with the plaintiff at the total purchase consideration of RM17,659,000 which was contra with the dividend payable to D5, whilst D3 nominated his company, D7 to receive Property 5 and Property 6 by entering into SPAs with the plaintiff at the total purchase consideration of RM5,628,600 which was contra with the dividend payable to D3.

**[14]** On 30 October 2017, the plaintiff was ordered to be wound up.

**[15]** Some nine months later, on 19 July 2018, Mr Tan Wai Leng from Cheng & Co Corporate Recovery Sdn Bhd was appointed by the court as the private liquidator of the plaintiff ('the liquidator') in place of the Official Receiver.

THE PLAINTIFF'S CASE — SUIT 472

**[16]** In gist, the plaintiff's various causes of action stem from the contention that the former directors deliberately distributed the said RM27m knowing the plaintiff was not financially sound to do so. Subsequent to the winding up, the liquidator received proof of debts ('POD') from a group of creditors who are purchasers, and had bought the said factories. The POD was predicated upon their claims for compensation for LAD amounting to RM6,443,802.41 arising from late delivery of vacant possession by the plaintiff.

**[17]** It was asserted that the forensic account review report dated 12 July 2019 ('FARR') prepared by Cheng & Co Global Advisory Sdn Bhd revealed that as early as 30 October 2015, the former directors of the plaintiff were in receipt and fully aware of letters of demand from the purchasers.

**[18]** Even so, by the Directors' and Members' Resolution on dividend distribution dated 7 December 2016, the former directors of the plaintiff unlawfully declared dividends in the sum of RM27m to themselves without paying any LAD.

**[19]** The unlawful declaration and payment of dividend made less than one year from the date of winding up ie 30 October 2017 was to enrich the former directors and shareholders. The six properties were also sold to D6 and D7 at an undervalue.

**[20]** The plaintiff therefore in this action filed on 23 August 2019 claim against the former directors, current directors and shareholders:

(a) a declaration that the Directors' and Members' Resolution dated 7 December 2016 of the plaintiff approving the distribution of the dividend of RM27m ('dividend') is null and void; and

(b) a return of:

(i) the entire dividend in the form of cash and the six properties from D3 to D7; and

(ii) the rental income generated from the properties from D6 and D7.

**[21]** Alternatively, the plaintiff sought declarations that D1 to D7 have breached:

(a) s 132 of the Companies Act 2016 ('the CA 2016');

(b) s 530 of the CA 2016;

(c) s 540 of the CA 2016; and

(d) consequently, the plaintiff seeks, inter alia, as follows:

(i) a repayment of the sum of RM6,550,603.16 being the total adjudicated LAD claims from D1 to D7; and

(ii) a repayment of income tax in the sum of RM6,480,000 from D1 to D7.

**[22]** In addition, the plaintiff claimed against all defendants:

(a) damages for conspiracy to defraud the company by dissipating its assets ie the RM27m; and

(b) relief for breach of ss 484 and 536 of the CA 2016 due to non-submission of statement of affairs.

## THE DEFENDANTS' DEFENCE

**[23]** In respect of the plaintiff's main prayers, it is the defendants' case that the declaration of the dividend is valid and lawful; the FARR is not an independent report:

(a) the law applicable to the alleged wrongful declaration of dividend is the CA 1965 and not CA 2016;

(b) the dividend payable was out of profits;

(c) the declaration of the dividend was above board and was captured in the records of the plaintiff. There was no concealment or suppression;

(d) the LAD claims had not crystallised when the declaration of dividend was made;

(e) the distribution of the dividend which was distributed partly in cash and partly by way of properties can be accounted for;

(f) the properties in question (save for the two small lots) were not undervalued; and

(g) the plaintiff is not entitled to the rental income generated from the said properties.

**[24]** In respect of the plaintiff's alternative prayers, it was contended that:

(a) there is no breach of ss 132, 530 and/or 540 of the CA 2016;

(b) consequently, the plaintiff is not entitled to claim the repayment sum of RM6,550,603.16 being the total adjudicated LAD claims;

(c) the plaintiff's claim in respect of the income tax of RM6,480,000 is fallacious;

(d) the claim based on fraud, conspiracy to defraud and fraudulent trading is misconceived and/or also lack particulars; and

(e) no tax is outstanding to the Inland Revenue Board.

## ANALYSIS AND FINDINGS

**[25]** The plaintiff bears the legal and evidential burden to prove on a balance of probabilities of establishing a case against the defendants throughout the trial before the onus shift to the defendants to establish their defence. In the case of *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61, the Federal Court held:

> Sections 101, 102, 103 and 106 of the Evidence Act 1950 deal with the burden of proof. *Under s 101, it is provided that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. Under s 102 the burden of proof lies on that person who would fail if no evidence at all were given on either side.* Under s 103, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Under s 106, when any fact is especially within the knowledge of any person

A the burden of proving that fact is upon him.

**[26]** I now deal with each of the plaintiff's claims.

*Whether the dividend declaration has breached s 132 of the CA 2016*

B

**[27]** The plaintiff asserted that there were creditors and tax unpaid.

**[28]** In this regard, s 365(1) of the CA 1965 and s 132 of the CA 2016 provides:

C

(a) CA 1965:

> 365 Dividends payable from profits only
>
> (1) No dividend shall be payable to the shareholders of any company *except out of profits* or pursuant to section 60.

D

(b) CA 2016:

> 132 Distribution only if company is solvent ...
>
> (2) The directors may authorize a distribution at such time and in such amount as the directors consider appropriate, *if the directors are satisfied that the company will be solvent immediately after the distribution* is made.
>
> (3) For the purposes of this section, the company is regarded *as solvent if the company is able to pay its debts as and when the debts become due within twelve months* immediately after the distribution is made.

E

F

**[29]** As is crystal clear, s 132 of the CA 2016 and s 365 of the CA 1965 prescribe different obligations involving a declaration of dividends.

G

**[30]** Under s 365 of the CA 1965, dividends are payable from profits only. However, s 132(2) and (3) of the CA 2016 specify the requirement of a 'solvency test' that a company can only make a distribution provided that the company remains solvent for the next 12 months after the distribution is made.

H

**[31]** In the course of the trial, I had alerted the parties to the recent decision of the Court of Appeal in *Kam Thai Eng Linda & Anor v Tan Sri Dato' Kam Woon Wah & Ors* [2023] 1 MLJ 765. I am of the considered view that the CA 2016 does not have retrospective effect. Any rights accrued, inter alia, under the CA 1965, before the enactment of CA 2016 would be preserved by s 620(4) of the CA 2016 (see *Mak Siew Wei v Yeoh Eng Kong and other appeals* [2020] 1 MLJ 258 (CA)). I agree with the defendants that *Kam Thai Eng Linda* is distinguishable as there were considerations there on whether obligations from the time the shareholders agreement was entered into through to the date that the OS was filed, 'should be carried into effect', which required invoking of

I

s 228 of the CA 2016. I find s 365 of the CA 1965 applies and further that the dividend declaration in this case was 'paid out of profits' based on:

(a) the company's reports and financial statements of 30 June 2016; the company had a retained profit of RM23,234,996 at 30 June 2016;

(b) in the company's reports and financial statements dated 31 December 2016, the company's comprehensive income (profit before income tax less income tax) amounts to RM4,046,688;

(c) the above two sums added up reveals the company's total retained profit of RM27,281,286;

(d) the dividend of RM27,000,000 was declared out of profits and in compliance with s 365(1) of the CA 1965;

(e) in fact, after distribution, there is still a balance retained profit of RM281,684 as admitted by both the liquidator and the forensic accountant during cross-examination; and

(f) the forensic accountant had also agreed during cross-examination that there is no wrong done if the old CA 1965 applies (see encl 432 NOP 20 March 2022 p 28).

*Whether the first to seventh defendants have committed fraudulent trading pursuant to s 540 CA 2016 or s 304 CA 1965*

**[32]** The plaintiff's basis for this charge was:

(a) that as early as 31 October 2015, the former directors of the plaintiff were aware of demands by the purchasers;

(b) that the former directors of the company had delivered vacant possession of the i-32 project to the various creditors/purchasers;

(c) that D1 and D4 resigned as directors from the company since 16 January 2017;

(d) that D2 and D3 resigned as directors from the company on 14 July 2017 but their Form 58 ('Resignation as Directors') was only lodged with the Commission of Companies of Malaysia two months later on 19 September 2017;

(e) that D8 and D9 were appointed as directors on 13 July 2017 but their Form s 58 of the CA 1965 ('Appointment as Directors') was also lodged on the same date on 19 September 2017;

(f) that the winding up petition dated 28 August 2017 was initiated against the company; and

(g) that the company was wound up on 30 October 2017.

**[33]** The plaintiff submitted that it is fraudulent for D1–D4 to declare RM27m dividend to themselves on 7 December 2016 when they knew there was a group of prospective LAD creditors initiating legal proceedings against the plaintiff to claim LAD (before it was wound up). Furthermore, by siphoning all the RM27m out of the plaintiff and paying to D1–D4 themselves leaving no money in the plaintiff, tantamount to dissipation of company's assets and making preferential payments to D1–D4, such conduct is within the meaning of fraudulent act, citing *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693.

**[34]** It was also submitted that both DW3 and DW4 alleged to have resigned on 14 July 2017, were still signing cheques belonging to the plaintiff. It was contended that obviously DW3 was lying that the plaintiff was sold to D8 and D9 and that the late lodgment on 19 September 2017 of DW3's resignation with SSM was due to the purportedly delay by the Company Secretary. The plaintiff also suggested that D2 and D3 backdated their resignation letters to allow D8 and D9 to be appointed as directors to replace them to avoid them being blacklisted, and this is a fraudulent act falling within the meaning of s 304 of the CA 1965 or s 540 of the CA 2016 and the common law conspiracy to defraud.

**[35]** On the totality of the evidence before the court, and bearing in mind that there were no LAD judgments when the declaration of dividend was made, that at the material time, when Suit 472 was filed in August 2019, the POD was not even adjudicated until a year later in Aug 2020, the court do not find that:

(a) on the ordinary standard of reasonable and honest people, what was done was dishonest; and

(b) that the defendants who were former directors of the company must have realised that the act was by those standards dishonest (see *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421 (CA)).

**[36]** I have borne in mind that at the time of declaration of dividend, there were no crystallised LAD claims; the LAD claims were being disputed at that material time; and prior the declaration of dividends, two legal opinions were sought ie legal opinion dated 2 September 2016 from M/s Joseph Ting & Co and legal opinion dated 15 November 2016 from M/s Gan & Zul to ascertain the plaintiff's liability on the alleged LAD claims. The plaintiff's Board of Directors at that material time was advised that the plaintiff has a good case in resisting the LAD claims.

**[37]** Fraud is a serious allegation and not to be lightly made. The point I am making is because of the mischief it brings and the havoc it wreaks in its wake. Spender AJ's words in *Burns v TAFE Commission of New South Wales* BC9403520 p 23 at para 57 aptly describes what a defendant goes through.

> A suit brought, which is charged with a phrase like 'fraud' '... can irrevocably damage a man or woman's personal reputation and professional standing: an exoneration month or years later may never repair the damage done. The charges may attract a blaze of publicity — the exoneration only a few lines. Some people may say that if the person charged had not been guilty the charges would not have been brought. A large amount of money may need to be spent on professional advice and the preparation of defenses; such expenses may be wholly lost. And nothing can recompense for the anxiety, strain, and social embarrassment that defending oneself against serious charges ... frequently causes.

**[38]** In this case, the evidence as a whole does not support a finding of fraud. There was no police report made. The allegations of fraud remained just that. I do not intend to deviate from what I held in *Al Sharhan Sdn Bhd & Anor v Edipro Construction & Engineering* [2021] 10 MLJ 585 and *Shiva Kumar Day v Allianz Life Insurance Malaysia Bhd & Anor* [2021] MLJU 823, on the lack of a police report. Both decisions were affirmed by the Court of Appeal. Even if the plaintiff is right in positing that the lack of a police report is not fatal, there is in this case, no basis for a finding of fraud.

**[39]** Neither was a report made by the liquidator here with SSM even though fraudulent trading carries grave consequences; underscored by the criminal sanctions spelt out in s 540(5) of the CA 2016 itself. Those are not just pretty words in the statute.

**[40]** That there is no fraud is also consistent with the two liquidator's reports and two forensic accountant's reports which were deafeningly silent on 'fraud'.

**[41]** In the course of the trial, the liquidator repeatedly said he relies on the testimony of the forensic accountant in substantiating the plaintiff's claim against the defendants:

> PDL: For details of fraud you keep referring, your answers say please refer to Ms Tay Lee Hoon ...
>
> Tan: Yes.

**[42]** The liquidator after going round in circles and flip-flopping on his testimony, admitted that in the preparation of his liquidator's report and the report on adjudication of POD, he had discussions with his lawyer, Mr KF Ee and the forensic accountant.

**[43]** The forensic accountant explained that although there is no such word 'Fraud' in her forensic account report, but there was a final conclusion of finding of fraud during one of the discussions attended by herself, PW1 the liquidator and one solicitor. When cross-examined about this 'oral finding of fraud' by the learned counsel for D3 and D7, she could not answer when the discussion took place, where it was held and who else was present at the discussion except that it was done in May 2020, which is nine months after filing Suit 472 and the same month that Suit 210 was filed!

**[44]** This 'oral finding of fraud' being not documented anywhere was agreed by the liquidator and the forensic accountant:

(a) NOP for day 3 of the trial on 11 April 2022/encl 427/PDF p 34:

> PDL: Thank you, My Lady. Mr Tan, now let's call this an 'oral opinion of Ms. Tay Lee Hoon'. Tay Lee Hoon oral opinion of fraud. Now Mr Tan, you would agree that it's not even stated in your Statement of Claim that she orally found fraud. Agree?
>
> TAN: Yes.
>
> PDL: And no documents, no documents of yours in the Bundles of Documents refer to this Oral Opinion by the forensic accountant Tay Lee Hoon.
>
> TAN: It's in her witness statement.
>
> PDL: No, documents. Documents, I'm not talking about witness statement.
>
> TAN: Ok.
>
> PDL: In all your documents there is no reference to an oral finding or oral opinion by Tay Lee Hoon. Agree?
>
> TAN: Yes.
>
> PDL: Yes, so that means no minutes of meeting, no emails, no letters between you and her referring to this oral opinion. Correct?
>
> TAN: Correct.
>
> PDL: Your witness statement doesn't refer to any oral opinion of Tay Lee Hoon either. Agree?
>
> TAN: Yes.

(b) NOP for day 8 of the trial on 21 April 2022/encl 433/PDF p 47:

> PDL: Nowhere in your Statement of Claim — in either Suit 472 or 210 — do you state that you made oral findings of fraud, you agree or disagree?
>
> TAN: I agree no statement, oral.

**[45]** From evidence elicited from the plaintiff's own witnesses during cross-examination, namely the liquidator and forensic accountant, it seems plain to me that the 'fraud finding arose from a discussion' only in May 2020. As such, it is not unreasonable for this court to say that such fraud finding that 'arose from a discussion' nine months after Suit 472 was filed, is inherently probable, a machination, and if I may add, a myopic and misconceived one at that, to validate the claim of fraudulent trading already before the court.

**[46]** I am also inclined to agree with Datuk Wong, learned counsel for D1, D2, D5 and D6's submissions that the expert report is inadmissible as it was not in the format of an affidavit. Even though an affidavit pursuant to O 40A r 3 was eventually affirmed by the forensic accountant subsequently, this was only done after the forensic accountant testified on 14 April 2022. But the affidavit in encl 400 was only filed in the English Language, which is not in compliance with the mandatory provisions of O 92 r 1(1) of the Rules of Court 2012.

*Former directors ignored LAD claims?*

**[47]** I am of the view that the plaintiff's argument in paras 78–80 that there is no bar to a claim for LAD when purchasers pay up the purchase price late, ignores with impunity the provisions of cl 17.1 of the sale and purchase agreements which in plain language reads:

> 17. Delivery of Vacant Possession
>
> 17.1 *Subject to* any extension or extension of time as may be allowed by the Architect *and provided* that the Purchaser shall have paid to the Vendor all instalments of the Purchase Price and any other sum under this Agreement as and when due and payable, the said Property, without any alterations and/or additions to the said Building, as stipulated under Clause 10 hereof shall be practically completed (as certified by the said Architect) and be ready for delivery of vacant possession to the Purchaser within thirty six (36) calendar months from the date of this Agreement PROVIDED ALWAYS that the Certificate of Completion and Compliance having been first obtained. In the event that the Vendor shall delay completion of the said building and the delivery of vacant possession of the said Property to the Purchaser beyond the aforesaid period of the said Property to the Purchaser agreed damages calculated from day to day at the rate of ten per centum (10%)pa on the purchaser price of the said Property from such aforesaid date to the date of actual or deemed delivery of vacant possession of the said Property to the Purchaser as hereinafter provided, whichever date shall be the earlier *PROVIDED ALWAYS* that the delay was not caused by the Appropriate Authorities. (Emphasis added.)

**[48]** With utmost respect, the plaintiff's misunderstanding of cl 17.1 underscores the reason why the POD was admitted; as clearly, cl 17.1 provides various defences to LAD claims. As one of the conditions to claiming LAD,

purchasers must have paid up all purchase instalments and any other sum payable under the SPA. I find nothing turns on the plaintiff's counsel's argument whether DW3's evidence can be construed as a concession that purchase instalments need not be fully paid before maintaining a LAD claim, as construction is a matter of law (see *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspidisi Ria Sdn Bhd)* [2005] 4 MLJ 101 (CA)). *Silver Concept* was referred to by the Federal Court in *Far East Holdings Bhd & Anor v Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1. It is not for a witness to say what a document means nor for counsel to concede what it is.

**[49]** In *Acoustic & Lighting System Sdn Bhd v Golden Affinity Development Sdn Bhd* [2017] MLJU 2283, the KL High Court dismissed the purchaser, Acoustic & Lighting System Sdn Bhd's LAD claim. Nantha Balan J (as His Lordship then was) decided that pursuant to cl 17.1 of the sale and purchase agreement, the plaintiff is absolved of any liability to pay LAD as there was still outstanding sums due and payable by Acoustic to the plaintiff. The *Acoustic* judgment dated 15 September 17 was affirmed by the Court of Appeal on 15 January 2019. *Acoustic*'s appeal to the Court of Appeal was opposed by the contributories viz ES Eng Soon Holdings Sdn Bhd ('D5'), Lee Haw Hann ('D4') and See Kok Seng ('D3') with the sanction given by the liquidator.

**[50]** The liquidator confirmed on the first day of trial under cross-examination that he was aware of the two legal opinions alluded to in para 36 above, and on the third day of trial, that there is no reason for him to doubt or challenge the legal opinions. Likewise, the forensic accountant testified under cross-examination on day 7 of the trial that she was aware of the two legal opinions that the plaintiff has a good chance in defending the LAD claims.

**[51]** Although made aware of the two legal opinions, as well as the High Court decision in *Acoustic* and the reasons for the decision which in fact confirmed the two legal opinions, yet, the liquidator when carrying out the report on adjudication of POD chose to ignore the *Acoustic* decision of the High Court as affirmed by the Court of Appeal with impunity, and instead sought to explain that there are two KL Sessions Court judgments in Civil Suit WA-B52NCVC-329–07 of 2016 and WA-A52C-43–05 of 2016 where the respective creditors, M Plus Property Sdn Bhd and Biocoslab Manufacturing Sdn Bhd succeeded and where the sessions court had turned down the purported defences of: (i) there was a delay cause by the relevant authorities; (ii) there was extension of time given by the architect; and (iii) there was outstanding sum still owing by the purchasers to the plaintiff under the sale and purchase agreement.

**[52]** With respect, the sessions court judgments are not superior to the High Court decision which was confirmed by the Court of Appeal. I agree with the defendants' submissions that the liquidator ought to have rejected the PODs filed by the purchasers who have an outstanding sum due and payable to the plaintiff.

**[53]** It is also stupendously eye-brow raising that the liquidator having pleaded in para 30.2 of the re-amended SOC that he was not in a position to adjudicate claims which have no judgment, was incredulously able to do so, in August 2020, a year after filing suit, and I need hardly add, disdainfully, turned a Nelson's eye to the *Acoustic* High Court decision and affirmed by the Court of Appeal. As such, it is not unreasonable for this court, after weighing the entire evidence, to infer that the purchasers' POD claims for LAD was admitted by the liquidator for expediency — to bolster a weak and hopeless case for breach of s 132 of the CA 2016 and/or for fraudulent trading. It was both unacceptable and mischievous for the liquidator to posit that if the contributories of the plaintiff are not happy with his decision to admit the proof of debt without court judgment, they are entitled to dispute the decision by filing an application with the Insolvency Court and thus, the POD report is deemed to be valid and binding as none of the defendants had filed any such application to challenge the POD report in the Insolvency Court as required so to do under s 279 of the CA 1965 and/or s 517 of the CA 2016 and/or r 93 of the Companies (Winding-Up) Rules 1972 if aggrieved, citing in support of his arguments:

(a) *Joseph Lee Yok Min @ Ambrose v Mayban Securities Sdn Bhd, Ipoh Branch (formerly known as Philleoallied Securities Sdn Bhd) & Anor* [2014] 2 MLJ 848; [2014] 3 CLJ 285 (CA);

(b) *Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor* [2016] 5 MLJ 242; [2016] 8 CLJ 597 (CA);

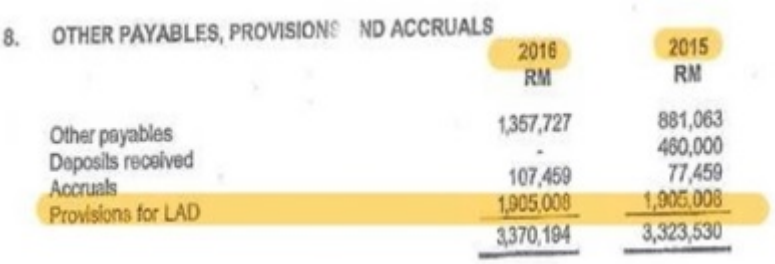
(c) *GS Paper & Packing Sdn Bhd v BSA Manufacturing Sdn Bhd* [2013] 1 LNS 421 (HC); and

(d) *Elite Mega Builders Sdn Bhd v Puncak Sepakat Sdn Bhd (Zamrud Intan Snd Bhd, applicant)* [2015] MLJU 1931; [2015] 1 LNS 414 (HC).

**[54]** I have no quarrel with the law stated in the above cases; but it does not change the fact that when the declaration of dividend was made in 2016, the LAD claims had not crystallised. I also do not find there is dissipation of assets of the plaintiff simply due to the plaintiff's assertion that the provisional sum of RM1,905,008 allocated for financial year 2015 was removed from the financial statements in 2016 and none of the purchasers were paid. The defendants had successfully challenged this narrative a well as the liquidator's and forensic accountant's evidence. This is firstly because the LAD claims in the year 2016

had not crystalised when dividend was declared. At the time dividend was declared, there was also no judgment against the company.

**[55]** Second, the plaintiff's allegation that the provision for LAD is missing in 2016 is untenable as the provisional sum of RM1,905,008 appeared in the audited report for financial year ended 30 June 2016 under Note 8 at p 18 of the report:



8. OTHER PAYABLES, PROVISIONS AND ACCRUALS

| | 2016 RM | 2015 RM |
|---|---|---|
| Other payables | 1,357,727 | 881,063 |
| Deposits received | - | 460,000 |
| Accruals | 107,459 | 77,459 |
| Provisions for LAD | 1,905,008 | 1,905,008 |
| | 3,370,194 | 3,323,530 |

**[56]** Third, I accept DW1 ('the plaintiff's auditor')'s evidence despite the plaintiff's attempt to malign him viz the special audit account for financial year end 31 December 2016 for the six months period of 1 July until 31 December 2016 was done to justify the distribution of RM27m is an afterthought. I find the attack on this report on the grounds that the directors did not give a 'true and fair view' of the plaintiff's financials contrary to s 169 of the CA 1965 and MFRS 137 issued by Malaysia Accounting Standard Board in failing to disclose contingent liability arising from potential LAD judgment as there were various on-going legal suits and as such, there is fraudulent concealment of these contingent liabilities and 'clear devil intention to defraud paying LAD to the creditors' in the strong words of counsel for the plaintiff, to be misplaced.

**[57]** In this regard, DW1 who was sub-poenaed, had explained that the provision for LAD of RM1,905,008 was reclassified to make provision for income tax instead. This is borne out by the plaintiff's special audit for the financial year ended 31 December 2016, under the 'Statement of Comprehensive Income for the period ended 31 December 2016' at p 6 of the report and Note 13 at p 16 as follows:

STATEMENT OF COMPREHENSIVE INCOME
FOR THE PERIOD ENDED 31 DECEMBER 2016

| | Note | 1.7.2016 to 30.12.2016 RM | 1.7.2015 to 30.6.2016 RM |
|---|---|---|---|
| REVENUE | | - | 22,429,311 |
| COST OF SALES | | - | (16,209,211) |
| GROSS PROFIT | | - | 6,220,100 |
| OTHER OPERATING INCOME | | 5,796,421 | 176,537 |
| ADMINISTRATIVE AND OPERATING EXPENSES | | (449,733) | (730,815) |
| PROFIT BEFORE INCOME TAX | 13 | 5,346,688 | 5,665,822 |
| INCOME TAX | 14 | (1,300,000) | (1,350,204) |
| TOTAL COMPREHENSIVE INCOME | | 4,046,688 | 4,315,618 |

Note 13 at p 16 of the report:

*(the remainder of this page is intentionally left blank)*

13. PROFIT BEFORE INCOME TAX

| | 1.7.2016 to 30.12.2016 RM | 1.7.2015 to 30.6.2016 RM |
|---|---|---|
| Profit before income tax is arrived at after charging/ (crediting):- | | |
| Auditors' remuneration | | |
| - Special audit | 30,000 | - |
| - Statutory audit: | | |
| - current year | - | 30,000 |
| - overprovision prior year | (8,050) | - |
| Depreciation (Note 4) | 1,583 | 4,748 |
| Rental of machinery (included in cost of sales) | | |
| - overprovision prior year | - | (10,709) |
| Staff costs: | | |
| - salaries, bonus & wages | 17,723 | 45,700 |
| - EPF & Socso | 4,918 | 2,459 |
| | 22,641 | 48,159 |
| Overprovision for LAD | (1,905,008) | - |
| Interest income | | |
| - fixed deposits | (488,419) | (174,912) |
| - sundry interest | (10,000) | (1,625) |
| - late interest from buyers | (9,504) | - |
| | (507,923) | (176,537) |
| Gain on disposal of investment properties | (3,383,490) | - |
| Finance cost: | | |
| Interest expense (included in cost of sales) | | |
| - term loan interest | | |
| - current year | - | - |
| - overprovision prior years | - | (635,650) |
| - bank overdraft interest | | |
| - current year | - | - |
| - overprovision prior years | - | (22,928) |
| - others | | |
| - current year | - | - |
| - overprovision prior years | - | (69,538) |
| | - | (728,116) |

**[58]** Fourth, it is basic, and there is no rocket science in accounting, that provisional sums may be reclassified or removed. In fact, the liquidator during cross-examination:

(a) admitted on day 3 of the trial on 11 April 2022, NOP pp 58 and 59 that he was not sure whether the purchasers without judgments were entitled to LAD when he filed his claim, and until he adjudicated the PODs, he was not sure whether there was a debt owed by the plaintiff to these purchasers;

(b) agreed with the counsel for the defendants that the RM1,905,008 was merely a provisional sum as no LAD had crystalised at the material time;

(c) agreed that the provisional sum of RM1,905,008 was merely an accounting figure for contingent liability which can be removed from the plaintiff's accounts or be reclassified from time to time:

(d) NOP: for Day 1 of the trial on 21 March 2022/encl 425/PDF p 84:

> WRY: Ok. Insofar as this provision is concerned, it is just, would you agree with my suggestion, it is just an accounting figure for contingent liability?
>
> TAN: For which amount?
>
> WRY: RM1,905,008.
>
> TAN: *It's a provision in the accounts.*
>
> WRY: *Yes, it is a, it has not been crystalised yet, isn't it at the time?*
>
> TAN: *Yes.*
>
> WRY: Your answer is yes, agree?
>
> TAN: Yes. Agreed.

(e) NOP for day 1 of the trial on 21 March 2022/encl 425/PDF p 84:

> WRY: ... Would you agree with my suggestion that this sum was only a provisional sum because at that time, no judgment has been obtained by any of the purchasers against the plaintiff. Agree, disagree?
>
> TAN: Yes.

(f) NOP for day 3 of the trial on 11 April 2022/encl 425/PDF p 45:

> PDL: Mr Tan, I now move on to your next question and answer in your witness statement. It is the 46, Question 46. Your question was, 'can I refer you to page 166 Ikatan Dokumen Bersama Jilid 2, can you please tell us what is this provisional for LAD amounting to RM1,905, RM1,905,008. So, you gave your answer, you said that the former Directors had allocated a sum for the payment of LAD and now we look at the word allocation. *Mr Tan, you are an auditor also and you have knowledge of accounts. A provision, an allocation or provision from time to time can be removed, isn't it? It's common in accounts, right?*
>
> TAN: *Yes.*

**[59]** Finally but not least important:

(a) there were the two legal opinions rendered to advise the Board that the plaintiff has a good case in resisting the LAD claims; the soundness of which were tested and confirmed in the High Court decision in the *Acoustic* case and affirmed by the Court of Appeal;

(b) the list of purchasers with sums outstanding to the plaintiff is set out fully in the table to para 118 of D1, D2, D5 and D6's submission in encl 450. The table is not produced here to avoid a lengthy judgment but the liquidator is fully aware and confirmed under cross-examination that if payments are outstanding, LAD is not payable:

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> WRY: So, one of the conditions is that the purchaser shall pay to the vendor all instalments of the purchase price and any other sum under this agreement, then only purchaser can claim for LAD. Am I right?
>
> TAN: Yes.

(c) there simply was no basis to expunge the documents in encl 319 as requested by the plaintiff's counsel since encl 319 were agreed documents;

(d) there were no LAD judgments against the plaintiff in December 2016 when the dividend declaration was made; and

(e) if the special audit for financial year ended 2016 did not give a 'true and fair view' of the plaintiff's financials contrary to s 169 of the CA 1965, it is inexplicable why the plaintiff did not lodge a complaint with SSM, the body tasked with investigating whether an offence has been committed. The plaintiff's attempt to mark IDD6 and IDD7 to discredit DW1 is rejected as I find firstly, the plaintiff did not satisfy the proviso to s 73A(1) of the Evidence Act 1950. I thus cannot consider the contents of these documents and the oral evidence adduced concerning them. See Abdoolcader J's judgment in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 183. Second, I find their contents has no relevance as DW1 is still a qualified and licensed auditor.

*Under valuation of properties/property 1–6 could have generated rental income*

**[60]** It is the plaintiff's case that Properties 1 to 6 were transacted below market value. But such a contention was vaporised firstly, by the liquidator himself. He was unsure if the sale of the properties were in fact below market value. In his report, he used the words 'potentially not at arm's length' or 'may not be at arm's length' and through his wobbling testimony when cross-examined by Dato' Wong.

**[61]** Second, the liquidator's valuer agreed that Jabatan Penilaian dan Perkhidmatan Harta ('JPPH') conducts their independent valuation of the purchase consideration of properties; and JPPH has the power to object or override if the purchase consideration stated in any sale and purchase agreement is contrary to their own valuation, and during cross-examination also agreed that the valuation and purchase consideration for Properties 1, 3, 4 and 5 were accepted by JPPH as the actual market value.

**[62]** Third, the IRB Tax Officer, the plaintiff's own witness who is familiar with the inner workings of JPPH also attested to the independence of JPPH with regards to the valuation of properties.

**[63]** In this case, based on evaluation of the overall testimony, this court has no reason not to accept JPPH's valuation of all six properties. Since JPPH in its assessment did not override the sale and purchase consideration of Properties 1, 3, 4 and 5 — which was based on JS Valuers' valuation, it is evident that JPPH accepted the purchase price of these four properties as the market value. These four properties, thus were not sold at an undervalue.

**[64]** For Property 6, this court also accepts JPPH's valuation and as such, D7 is ordered to pay the differential sum of RM46,000 to the plaintiff under s 295 of the CA 1965 or s 530 of the CA 2016.

**[65]** As for Property 2, JPPH's valuation is also accepted. D1, D2, D5 & D6 are ordered jointly and or severally to pay a sum of RM36,000 to the plaintiff.

**[66]** As for the claim for rentals, I find there is no evidence adduced by the plaintiff to suggest that Properties 1, 3, 4 and 5 were rented out in the first place. This claim falls.

*Whether the defendants have conspired to defraud the plaintiff in dissipating its assets vis a vis the dividend of RM27m; common law conspiracy to defraud*

**[67]** The plaintiff asserted that it has made out a case for both types of conspiracy to defraud whether the first type of 'wrongful means conspiracy' or the second type of 'simple conspiracy' or 'conspiracy to injure'.

**[68]** In so far as the claim for conspiracy is concerned, in my respectful view, this bears on the primary issue whether the directors have breached s 132 of the CA 2016. I have examined the legality of the impugned distribution of dividend exercise and found that the CA 1965 applied; if there is no breach of s 132 of the CA Act 2016, the claim for conspiracy crumbled.

**[69]** In the event, I find too that the pleading here on the conspiracy claim to be deficient.

**[70]** An allegation of conspiracy is equivalent to that of fraud: *Ng Ah Ba & Ors v Ramanda Sdn Bhd* [1996] 1 MLJ 62 (CA). As with fraud, it is a serious allegation and should not be lightly made: Hely J in *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290; BC200501342 said:

> [59] Like fraud, conspiracy is not an allegation that should lightly be made: *Hughes*

*v Western Australian Cricket Assn Inc* (1986) 69 ALR 660 at p 700 (Toohey J).

**[71]** As such, it is trite that conspiracy (like fraud) must be strictly pleaded and each element of the tort must be fully particularised:

(a) in *Repco (M) Sdn Bhd v Tan Toh Fatt & Ors* [2013] 7 MLJ 408, it was held:

> [64] ... It is settled law that the assertion of conspiracy requires the *strictest pleading* and must be supported by full particulars. It is also settled law that parties are bound by their pleadings and shall not adduce any evidence for issues which had not been pleaded. It is trite that unless particulars of conspiracy are specifically pleaded, no evidence can be led on them (*YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621).

(b) in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394, the Court of Appeal held that:

> [48] Just as fraud must be pleaded with great particularity, so must the constituent ingredients of the alleged conspiracy by TC Euro be pleaded.

(c) in *City of London Group PLC v Lothbury Financial Services Ltd* [2012] EWHC 3148:

> [74] ... First of all, as is evident from David Richards J's judgment in *McKillen*, the particulars of claim must properly plead and particularise the necessary elements.

See also *Gasing Heights Sdn Bhd v Aloyah Bte Abd Rahman & Ors* [1996] 3 MLJ 259 at paras 269E and 269F; *Karaha Bodas Co Llc v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR 112 (CA) at para [30].

**[72]** The intending plaintiff cannot merge the two types of conspiracies together in the pleading since there is a clear distinction between the two types of conspiracies. Otherwise, it will prove difficult for the defendants to answer to the allegations. Pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her.

**[73]** If the type of conspiracy is not clearly pleaded, the pleading is bad:

(a) *McKellar v Container Terminal Management Services Ltd* [1999] 165 ALR 409 at para 191:

> [191] It is by no means clear which of those forms of conspiracy the applicants seek to plead at this point in their amended statement of claim, just as it is unclear throughout the entire pleading which form of conspiracy is being addressed. The applicants do not appear to have turned their minds to

just what are the essential elements of each such cause of action. That failure is just one of a number of reasons why the conspiracies pleaded are embarrassing.

The pleading was struck out: at para 296.

(b) *Satchithanantham v Zeaiter Corporate Holdings Pty Ltd* [2011] NSWSC 1609:

> [53] ... If it is a common law pleading of conspiracy, the pleading does not identify what is the precise agreement which constitutes the alleged conspiracy. Nor does it make clear whether the alleged conspiracy was one to use lawful or unlawful means. The ASOC is embarrassing and should be struck out as against the first and second defendants.

**[74]** In the instant case, the conspiracy set out in in the re-amended SOC does not make clear the pleaded type of conspiracy and its elements, and with respect, the consequences should be strict and warrants a dismissal of the claim for conspiracy.

**[75]** Added to that, conspiracy was never put to any of the defendants' witnesses. This attracts the application of the principle in *Browne v Dunn* (1893) 6 R 67 and accepted by the Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 and in *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 — it must be taken that the plaintiff has abandoned his pleaded claim. The Court of Appeal in *Aik Ming* applied the principle in *Browne v Dunn* and said:

> Now, all this is contrary to two fundamental rules of procedural fairness that operate in the environment of private law. The first of these rules relate to the pleaded case while the second has to do with the cross-examination of witnesses. ... The content of the second rule may be stated thus. It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

OTHER CLAIMS

**[76]** As for the alleged non-submission of statement of affairs under ss 484 and 536 of the CA 2016 — these were not put to any of the defendants' witnesses and the plaintiff is deemed to have abandoned these claims.

**[77]** In regards to the claim for unpaid income tax of RM6,480,000 for RM27m dividend distributed, this claim is plainly misconceived and the liquidator well knew it was made plain from the evidence below. Section 108 of

the Income Tax Act 1967 is clear — there is no tax deductible from the distribution of the dividend:

> PDL: Mr Tan, you recall during the evidence of Encik Nasruddin from LHDN we went through the law, Section 108 of the Income Tax Act. I share screen now. I think that's best. *So, Section 108 do you agree with Mr Tan it is the instructions to all companies that they do not calculate tax on dividend paid? Agree or disagree?*
>
> TAN: Sorry, your questions?
>
> PDL: *When you calculate, there is no tax, there is no tax payable on dividend. That is Section 108 of the Income Tax Act. You agree, right?*
>
> TAN: *Yes.*
>
> PDL: *That means you agree also with what Encik Nasruddin said. Encik Nasruddin gave the same evidence and so you agree what he said, right?*
>
> TAN: *Yes.*

**[78]** With the above tax claim imploded, in an attempt to show that there is yet some tax due, the plaintiff surfaced during the course of trial, JA form dated 17 May 2022 (at PDF p 16, physical p 2405, *Jld* 17, encl 280) marked as IDP10 and tax computation (marked as IDP12). In seeking to mark these documents as exhibits, it was contended by the plaintiff that there is no prejudice to the defendants as IRB is claiming a lesser sum plus authenticity of these documents are not disputed.

**[79]** However, the defendants objected to the admissibility of these documents and disputed their authenticity.

**[80]** I have urged the parties to submit post trial on these two documents.

**[81]** Having heard arguments, it is my finding that IDP 10 and IDP12 are not admissible as:

(a) despite the authenticity of these documents were challenged by the defendants, the plaintiff did not bother to recall the IRB officer to have the documents marked or to lead further evidence;

(b) the IRB officer had earlier testified that there is no tax due and owing by the plaintiff; and

(c) he further testified in fact there was an over-payment of RM65,250.32.

**[82]** It is well established that a party is bound by the evidence of witnesses whom he calls in proof of his case and this rule is enforced with full rigour in civil cases (see the Court of Appeal decision in *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 at p 47; [1998] 3 CLJ 769 at p 788). In *Kheam Huat Holdings Sdn Bhd v The Indian Association, Penang* [2000] 7 MLJ 74;

[2000] 1 LNS 355, Abdul Hamid Embong J (as His Lordship then was) applied the principle in *Lim Guan Eng*'s case and held that the plaintiff was bound by the evidence of its witness, even if it is damning in some parts.

**[83]** Thus, the evidence of the IRB officer (as the plaintiff's own witness) that JPPH's valuation is independent and that no tax was owed by the company is binding on the plaintiff.

**[84]** As such, I will not admit these documents as exhibits. The tax claim disintegrated.

**[85]** In arriving at, and making the findings in this case, this court takes the view that the defendants' assertions that both the liquidator and forensic accountant are not independent and have their own agenda to serve, is not unattractive or without basis. In this regard, the court has taken note that:

(a) the liquidator during cross-examination had testified that notwithstanding that he is supposed to prepare the liquidator's report independently, it was revealed that the report was premised heavily on the findings in the forensic accountant's report notwithstanding in the words of the forensic accountant, the 'shortcomings' and 'significant limitations' in the forensic accountant's report:

(i) NOP: Day 3 of the trial on 11 April 2022/encl 427/PDF p 26:

> PDL: So, despite these significant limitations, this is her own words, 'significant limitations', you proceeded to premise your liquidators report on the findings of this forensic accountant report, right?
>
> TAN: Yes.

(ii) NOP — Day 3 of the trial on 11 April 2022/encl 427/PDF p 27:

> PDL: No, Mr Tan, very simple. Do you agree or not you based your report on Ms. Tay's report? Your own liquidators report is based on Ms Tay's forensic accountant report. Yes, or no?
>
> TAN: Yes.

(b) the liquidator admitted that in the preparation of his liquidator's report and the report on adjudication of POD, he had discussions with his lawyer, Mr KF Ee and the forensic accountant;

(c) the forensic accountant when cross-examined about this 'oral finding of fraud' by learned counsel for D3 and D7 could not answer precisely when the discussion took place, where it was held and who else was present at the discussion except that it was done in May 2020 — which is nine months after filing the first suit and the same month the second suit was filed;

(d) during the course of the trial, the liquidator repeatedly said he relies on the testimony of the forensic accountant in substantiating the plaintiff's claim against the defendants:

> PDL: For details of fraud you keep referring, your answers say please refer to Ms. Tay Lee Hoon ...
>
> Tan: Yes.

(e) the liquidator for his own unacceptable reasons, refused to pay heed to the *Acoustic* decision which was affirmed by the Court of Appeal when adjudicating the POD by the purchasers;

(f) it was fascinating to this court that the forensic accountant testified that she did not raise fraud — it was raised by the liquidator and Mr KF Ee and they concluded it was fraud;

(g) the forensic accountant when confronted that she was not independent, sought to belatedly explain that whenever the words 'we', 'our' and 'us' are used, in her witness statement, they refer to the 'liquidator and the liquidator's solicitor';

(h) the forensic accountant's company viz Cheng and Co Global Advisory Sdn Bhd is the parent company of the liquidator's company viz Cheng and Co Corporate Recovery Sdn Bhd; and

(i) the forensic accountant is supposed to be an independent expert witness. Her overriding duty as an expert is to assist this court in arriving at a right decision and this duty overrides any obligation to the party from whom she has received instructions; or by whom she is paid. Not only must she be independent but she must be seen to be independent (see *Ooi Woon Chee & Anor v Dato' See Teow Chuan & Ors* [2012] 2 MLJ 713 (FC)).

**[86]** For all the reasons given, I find the declaration and distribution of the dividend made out of profits is lawful in accordance with s 365 of the CA 1965. The plaintiff's other or alternative causes of action have not been proven on a balance of probability. Suit 472 is thus dismissed with costs except for the orders for payment for Property 2 and Property 6 sold at undervalue. D7 is ordered to pay the differential sum of RM46,000 to the plaintiff under s 530 of the CA 2016, for Property 6. As for Property 2, D1, D2, D5 & D6 are ordered jointly and or severally to pay a sum of RM36,000 to the plaintiff.

**[87]** I should make clear that Appendices A and B to the plaintiff's submissions were not considered by this court for reason that it amounts to introduction of fresh evidence after trial on the plaintiff's part.

SUIT 210

**[88]** Suit 210 was filed subsequent to Suit 472 as a consequence of the supplemental forensic account report which was only completed on 6 May 2020 and the supplemental liquidator report which was only completed on 21 May 2020. In Suit 210, the liquidator alleged that a sum of RM6,240,000 was unlawfully dissipated by D1 to D4 and was fraudulent trading pursuant to s 540 of the CA 2016 against the same body of LAD creditors as in Suit 472.

**[89]** D1 and D2 successfully struck out Suit 210 against them. The liquidator's claim remained against D3 and D4 and is reduced to RM2,675,000 only and not RM6.4m.

**[90]** It was agreed by the parties that the findings of fact in Suit 472 will bind the parties in Suit 210.

D3

**[91]** The plaintiff sought as against D3:

(a) a declaration that third and fourth defendants' have breached s 540 of the CA 2016;

(b) the third defendant is to pay RM1,680,000 to the plaintiff together with interest of 5%pa effective from the date of payment on 3 March 2017 until full settlement of RM1,680,000;

(c) the third and fourth defendants' to jointly and/or severally pay general damages and/or exemplary damages to be assessed by the court to the plaintiff together with interest of 5%pa effective from the dated of 18 December 2016 until full repayment; and

(d) costs on a solicitor-client basis.

**[92]** At the outset, it is to be noted that, Lee Haw Hann as one of the shareholders of the plaintiff, had on 7 December 2016, issued an instruction in writing to the Board of Directors of the plaintiff instructing that his entitlement to the interim dividend be paid directly to D3 and Lim Boon Kang as repayment of loan.

**[93]** From the evidence before the court, I find the payment of RM1,680,000 received by D3 was due to the distribution of the interim dividend as Lee Haw Han's entitlement as one of the shareholders of the plaintiff. The declaration and distribution of dividend as I have earlier found, was not unlawful. Even if there was no loan agreement, Lee Haw Hann was entitled to choose whom he wishes his entitlement to dividend to be paid to.

**[94]** D3 is also not a director of the plaintiff. The plaintiff has not led any contemporaneous evidence and/or provided sufficient particulars to show that D3 was in control of the plaintiff and/or the directing mind behind the trading of the plaintiff and/or has any involvement with the business of the plaintiff (see *Zamzam Arabic Food Holding Sdn Bhd & Anor v Johanjana Corp Sdn Bhd* [2022] 5 MLJ 302).

**[95]** My findings in Suit 472 that there is no fraudulent trading also applies to this suit. This claim against D3 is unsustainable.

**[96]** As for D4, the claim for fraudulent trading is bereft of merits as earlier found. As for the balance claim against D4, it is based on three cheques made to him:

(a) RM200,000 via OCBC cheque 00084 dated 6 December 2016 ('first payment');

(b) RM495,000 via OCBC cheque 000862 dated 6 December 2016 ('second payment'); and

(c) RM500,000 via OCBC cheque 666373 dated 11 May 2017 ('third payment').

**[97]** It was admitted by the liquidator that the first payment of RM200,000 claimed was part of Suit 472 — para 37 of the SOC for Suit 210.

**[98]** The liquidator alleged that the payment of a total sum of RM2.12m cashed out by D2 (against whom the suit was struck off) and of which a sum of RM995,000 was attributable to D4 was to enrich themselves fraudulently and to deprive the purchasers of their LAD claims as there was no letter of award, architect certificate, no receipts issued by the contractor, Tan Yong Seng Civil Engineering Work ('TYS'). However, the forensic accountant does not know what these payments were for. She made a finding of 'unknown'. It is clear from the notes of proceedings at pp 113 to 114 on 11 April 2022 that the liquidator himself morphed 'unknown' as found by the forensic accountant to 'fraud'. On the other hand, D4 produced documentary evidence at pp 177–179; encl 217; CBD 5 to show the payments from the company to TYS through D2 and D4 recorded vide payment vouchers; TYS's demand letter to the company, pictures of TYS's place(s) of business; and the liquidator's letter was delivered to a representative of TYS. These documents were exhibited in D1 & D2's striking out application, and the court did order a striking out of Suit 210 against D1 and D2.

**[99]** Significantly, the totality of evidence brings to the fore to this court that the actual complaint against D4 in respect of this sum of RM995,000 is to all

intent and purposes one of undue preference. Under cross-examination, the liquidator admitted his real complaint against the payment of the RM2.12m paid to TYS was that D1 and D4 chose to pay TYS the monies as opposed to the alleged LAD creditors.

> PDL: So, you're saying that my client chose to pay TYS instead of those LAD Claimants?
>
> Tan: Yes.
>
> ...
>
> PDL: So, Mr Tan what you are saying is that my client, my client Dato' See that Fourth defendant, in making that RM995,000 payment to TYS has preferred that creditor over the LAD Claimants?
>
> TAN: Yes.
>
> PDL: And the preference you are saying here is not the correct preference?
>
> TAN: Yes.

**[100]** Fraudulent trading and undue preference are as different as cheese is from chalk. Undue preference was however not pleaded and must now be moot.

**[101]** It is established law that parties are confined to their pleadings and courts are to decide on issues raised in them. The confinement of issues within the four corners of the pleadings, amongst others, help the court identify and adjudicate in an orderly fashion the matter before it, prevent surprises, and to inform parties in advance of the case they have to meet and thereafter deal with them accordingly (see the latest case on this subject, in *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292), where the Federal Court held:

> [27] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, *State Government of Perak v Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be granted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 . In the *Chartered Bank v Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

**[102]** Specifically, the Federal Court in the case of *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697 had held that:

> [60] It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts and submissions on matters which they had not pleaded. Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313 and *Blay v Pollard and Morris* [1930] 1 KB 628).

**[103]** The claim for fraudulent trading do not resonate with this court and I find the plaintiff has not proven its claim as pleaded on a balance of probability. It seems to me that the issues and the submissions in Suit 210 on fraudulent trading overlaps with and is duplicitous of the allegation of fraudulent trading in Suit 472.

**[104]** In the circumstances, Suit 210 is dismissed with costs.

*Who is entitled to costs/whether liquidator should pay costs personally*

**[105]** Pursuant to the dismissal of Suit 210 and most of the claims in Suit 472, the parties were invited to submit on costs as the defendants had urged that costs be personally borne by liquidator. Costs was reserved for decision on 18 January 23.

**[106]** The first issue to be decided was whether the plaintiff should pay the costs of the two suits despite being awarded the sum of RM46,000 to be paid by D7 for Property 6 and RM36,000 to be paid by D1, D2, D5 & D6 jointly and or severally for Property 2.

**[107]** The plaintiff argued that it is entitled to costs of the action. However, I find the cases cited by the plaintiff's counsel are distinguishable as each of the cases cited had only one cause of action eg *Goldiant Development Sdn Bhd v Fan Boon Heng* [2018] MLJU 324; [2018] 1 LNS 338 is a claim for damages for breach of contract. *Sainimuda bin PM Salleh & Anor v Mohd Amin Pare & Ors* [2018] MLJU 2065; [2018] 1 LNS 2188 pertains to a claim of possession of land and consequential order for damages. *Muthiah a/l Ramasamy v Muguthan a/l Vadiveloo (sole practitioner in the name and style of Messrs Mugu & Sufyan & Co)* [2022] MLJU 1028; [2022] 7 CLJ 940 is about a claim for damages premised on negligence. *Mohd Isha bin Awang v Mohamad Idris bin Seramal Baris* [2020] 6 MLJ 116; [2020] 9 CLJ 760 (CA) is about a claim for damages premised on enticement. *Koperasi Kastam Diraja Malaysia Bhd v Yi Go Group Sdn Bhd* [2021] 5 MLJ 590; [2021] 10 CLJ 31 (CA) deals with a contract for services.

**[108]** Unlike the cases cited, the two suits here involved various causes of action which the plaintiff did not succeed.

**[109]** There was a pyrrhic victory for the plaintiff as made evident by the findings and decision of the court.

**[110]** Considering that the defendants have succeeded in defending most heads of claim, I am of the respectful view that the defendants should be entitled to costs.

**[111]** As to the second issue whether the liquidator should be made to pay costs personally, I am guided by *Markcon Sdn Bhd (in liquidation) v Resilient Construction Sdn Bhd (Labtec Sdn Bhd & Anor; Opposing Creditors)* [1993] 3 MLJ 429 which explained that the court has a discretion to award costs personally against the liquidator as a sanction for instituting unnecessary proceedings or incurring unnecessary litigation expenses.

**[112]** That inevitably begs the question 'Were the actions brought by the liquidator unnecessary or had caused unnecessary litigious expenses or whose action needed to be sanctioned?'. If so, the liquidator would personally have to bear the costs.

**[113]** Obviously, each case must be evaluated and analysed on its own facts. The court is entitled to take into account a variety of factors and circumstances including the sufficiency of the evidence adduced, the likelihood of success of the prospective suit.

**[114]** In this case, I am respectfully of the view that there is evidence that the liquidator had instituted these actions, in the name of the plaintiff, out of bad faith or a misguided sense of propriety of the course of action he has taken. As mere examples:

(a) whether the dividend declaration has breached. Section 132 of the CA 2016. It is clear that the CA 2016 only came into force on 31 January 2017, it was the old CA 1965 that was in force in 2016. The liquidator's report itself at p 13 CBOD1 encl 194 states that the old Act applies. There is no solvency test under CA 1965;

(b) knowing of the *Acoustic* High Court judgment which was upheld by the Court of Appeal in 2019, yet the liquidator proceeded to adjudicate the PODs in 2020, long after Suit 472 was filed to shore up the case, and in so doing ignored late payments made by the purchasers. That is not reasonable conduct of a liquidator, and there is no valid or acceptable reason advanced as to why; particularly when the purchasers' claims involve the same SPA and project;

(c) attempting to make a claim based on fraud when his own two liquidator's reports and two forensic accountant's reports were deafeningly silent on 'fraud'. And then justifying such a claim purportedly on the basis that the 'fraud finding arose from a discussion' to validate its claim of fraudulent trading;

(d) so too the claim for conspiracy to defraud the plaintiff in dissipating its assets vis a vis the dividend of RM27,000,000. It was not even pursued properly at trial or at all; and

(e) the claim for over RM6m purportedly as tax for the RM27m dividends distributed is so hopelessly misconceived, when there is no tax payable as plainly provided by s 108 of the Income Tax Act 1967.

**[115]** The court did not think that the plaintiff and their advisors could have believed that they had an arguable case on these heads of claim particularly on fraud; causing 16 days of trial, and putting a tremendous strain on the administration of justice, not forgetting the unnecessary trees chopped due to the voluminous documents involved in both supporting and defending the claims.

**[116]** Charges of fraud are not to be lightly made and following *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 where the case brought before the court was on extremely serious charges of fraud, the court aptly said:

> ... this was a case where a liquidator in his position, without assets to back him, must be held to have started the litigation at his own expense.

**[117]** The liquidator and the forensic accountant's firm were inextricably linked, intertwined and involved in the entire claims before the court in trying to justify a claim on fraud after action was filed.

**[118]** In this case, I am of the considered view that costs should not be paid out of the assets of the company, as that will impinge on the contributories' rights to surplus of funds, if any.

**[119]** I thus find that the evidence and conduct of the liquidator warrants an order for costs to be made personally against him.

**[120]** As for quantum for costs, taking into account the criterias set out in O 59 r 16 of the Rules of Court 2012, viz the skill, specialised knowledge and responsibility required, and the time and labour expended in drafting, getting up and with 16 days spent at trial alone, I am of the view that after taking into account that the plaintiff himself is of the view a sum of RM150,000 is fair if the shoe was put on the other foot, and taking into account the plaintiff did

succeed in respect of payment on Property 2 and Property 6 and succeeded in claiming RM46,000 against D7 and RM36,000 against D1, D2, D5 and D6 jointly and severally, I would order reasonable costs subject to allocator as follows against the liquidator personally:

(a) Suit 472:

119.1 RM120,000 for D3 & D7;

119.2 RM120,000 for D1, D2, D5 & D6; and

119.3 RM70,000 for D4.

(b) Suit 210:

119.4 RM70,000 to D3, Lim Boon Hung; and

119.5 RM25,000 to D4 (See) as some of the issues overlap with Suit 472.

**[121]** The security for costs will be used to defray part of the costs ordered.

*Order accordingly.*

Reported by Ahmad Ismail